Supreme Court, U.S.
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No. 00-___

In The

Supreme Court of the United States

C&L ENTERPRISES, INC.,

Petitioner,

v.

CITIZEN POTAWATOMI NATION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is an arbitration agreement, contained in a contract executed by an Indian tribe for commercial construction outside of reservation or trust land boundaries, enforceable by the arbitration proceedings provided for in the agreement?

II. Where the arbitration agreement provides:

> The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof . . . ,

does execution of such an arbitration agreement constitute a waiver of sovereign immunity from a state court suit against the Indian tribe to enforce an arbitration award resulting from such arbitration proceedings?

PARTIES TO THE PROCEEDING BELOW

The Petitioner (Plaintiff/Appellee below) is C&L Enterprises, Inc., an Oklahoma Corporation.

The Respondent (Defendant/Appellant below) is the Citizen Potawatomi Nation, a federally recognized Indian tribe, formerly known as the Citizen Band Potawatomi Indian Tribe of Oklahoma. Respondent was identified in the state court case caption as "Citizen Band Potawatomi Tribe of Oklahoma a/k/a Citizen Band Potawatomi Indians of Oklahoma."

CORPORATE DISCLOSURE STATEMENT

Petitioner, C&L Enterprises, Inc., is a nongovernmental Corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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OPINIONS BELOW

The unpublished original opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2 (filed November 5, 1996) affirming judgments of the District Court of Oklahoma County, Oklahoma, in favor of Petitioner is reprinted in the Appendix at App. 12. Respondent's Petition to this Court for certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721), was granted by this Court on June 1, 1998, and, on the same date, this Court ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). This Court's orders are reprinted in the Appendix at App. 8, 9. The unpublished opinion of the Court of Civil Appeals for the State of Oklahoma, Division 2, reversing, on remand, the judgments of the District Court of Oklahoma County, Oklahoma (filed February 8, 2000) is reprinted in the Appendix at App. 2. The unpublished Order of the Court of Civil Appeals for the State of Oklahoma, Division 2, (filed March 27, 2000) denying the Petitioner's petition for rehearing is reprinted in the Appendix at App. 10.

BASIS FOR JURISDICTION

Petitioner seeks review of the Oklahoma Court of Appeals decision filed February 8, 2000. Petitioner's timely petition for rehearing was denied by order filed March 27, 2000. Petitioner's timely petition for writ of

certiorari seeking discretionary review by the Oklahoma Supreme Court, being the state court of last resort, was denied May 24, 2000. This Petition is being filed within 90 days after denial of said discretionary review pursuant to U.S. Sup. Ct. Rule 13.1 and jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Okla. Stat. tit. 15 § 802 (West 1993) provides:

> § 802. Application of act – Courts – Jurisdiction
>
> A. This act shall apply to a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties. Such agreements are valid, enforceable and irrevocable, except upon such grounds as exist at law or in equity for the revocation of any contract. This act shall not apply to collective bargaining agreements or contracts with reference to insurance except for those contracts between insurance companies.
>
> B. The term "court" as used in this act means any court of competent jurisdiction of this state. The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

2. Okla. Stat. tit. 15 § 811 (West 1993) provides:

§ 811. Court to confirm award

Upon application of a party to the agreement, the court shall confirm an award, unless within the time limits imposed herein grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13 of this act.

3. Okla. Stat. tit. 15 § 812 (West 1993) provides:

§ 812. Vacation of award – Grounds

A. Upon application of a party, the court shall vacate an award if:

1. The award was procured by corruption, fraud or other illegal means;

2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

3. The arbitrators exceeded their powers;

4. The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the requirements of this act, as to prejudice substantially the rights of a party; or

5. There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 3 of this act and the

party did not participate in the arbitration hearing without raising the objection.

B. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

C. An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant. If predicated upon corruption, fraud or other illegal means, the application shall be made within ninety (90) days after such grounds are known or should have been known.

D. When vacating the award on grounds other than stated in paragraph 5 of subsection A of this section, the court may order a rehearing before new arbitrators are chosen as provided in the agreement. In the absence of such provision, new arbitrators shall be chosen by the court in accordance with Section 4 of this act. If the award is vacated on grounds set forth in paragraphs 3 and 4 of subsection A of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 4 of this act. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

E. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

4. Okla. Stat. tit. 15 § 813 (West 1993) provides:

> § 813. Modification or correction of award by court – Grounds
>
> A. Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:
>
> 1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> 2. The award is imperfect in a matter of form, not affecting the merits of the controversy; or
>
> 3. The arbitrators have made an award upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted.
>
> B. If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as modified and corrected. Absent any modification or correction, the court shall confirm the award as made.
>
> C. An application to modify or correct an award may be joined in the alternative with an application to vacate the award.
>
> D. Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of

the proceedings subsequent thereto, and disbursements, may be awarded by the court.

STATEMENT OF THE CASE

On August 25, 1993, Respondent, the Citizen Band Potawatomi Indian Tribe of Oklahoma, ("Potawatomi") presented to Petitioner, C&L Enterprises, Inc., ("C&L") a proposed contract for C&L's construction of the roof upon a bank building on non-reservation, non-trust land owned by Potawatomi (hereafter the "Contract"). Potawatomi's Contract was made upon an American Institute of Architects form agreement chosen by Potawatomi. Potawatomi and/or its architect drafted the contract terms and provisions not set forth in the form. The Contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . The award rendered by the arbitrator or arbitrators shall be final, and **judgment may be entered upon it** in accordance with applicable law in any court having jurisdiction thereof . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein **shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**

(App. 46, Article 10.8) (emphasis added).

After execution of the Contract, Potawatomi decided to change the type of roof and entered into a contract with another company in breach of the Contract with C&L. Said breach occurred before construction had progressed to the point where any physical roofing work was required and prior to C&L being given a notice to proceed under the Contract. C&L gave notice to the architect and Potawatomi of its damages – lost profits – and its demand for arbitration as provided by the Contract. (App. 34, Article 2.1)

Potawatomi was represented by counsel and repeatedly corresponded to AAA (the American Arbitration Association) setting forth its arguments and claimed authorities regarding the factual issues and arguments alleging sovereign immunity from suit. In the arbitration hearing C&L was required to and did present exhibits, testimony and argument to prove its claim as noted in the Arbitration Award and as required by Rule 30 of the Construction Industry Arbitration Rules of AAA which provides:

> An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.[1]

After conclusion of the arbitration hearing and consideration of the evidence submitted, the arbitrator

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[1] Exhibits "C," "D," "E" and "F" to Objection to Defendant's Motion to Dismiss, *C & L Enterprises Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

rendered its award in favor of C&L in the amount of $25,400.00 plus attorney's fees of $2,230.00, costs of $34.67 and arbitration fees of $750.00. (App. 61).

C&L thereafter brought suit in the District Court of Oklahoma County to confirm the arbitration award consistent with Oklahoma law and the terms of the arbitration agreement. (App. 28).

Potawatomi brought a motion to dismiss the state court action asserting sovereign immunity. C&L responded asserting: that because the Contract between Potawatomi and C&L was executed outside of Indian Country, sovereign immunity never attached; that the terms of the arbitration agreement explicitly waived whatever sovereign suit immunity existed as to the Contract at issue; and that the contract was properly enforceable by arbitration and ultimately in state court.[2] The District Court of Oklahoma County denied Potawatomi's motion to dismiss and denied Potawatomi's subsequent motion to reconsider. (App. 24-26).

Potawatomi failed to make application for an order vacating, modifying or correcting the Arbitration Award within ninety (90) days after delivery of a copy of the Award to Potawatomi as required by to 15 Okla. Stat. tit. §§ 812, 813. Thereupon, C&L filed its Motion for Confirmation of Arbitration Award giving Potawatomi notice of the same and the hearing set. Potawatomi chose not to appear or otherwise oppose the motion and the trial

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[2] Objection to Defendant's Motion to Dismiss, pp. 4-10, *C & L Enterprises Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

Court accordingly entered Judgment confirming the Award as mandated by 15 Okla. Stat. tit. § 811. (App. 21).

Subsequently, pursuant to Oklahoma law, C&L made an original and amended fee application giving notice of the application for fees and hearing date thereon to Potawatomi. Potawatomi failed to appear or otherwise respond to such fee applications. Judgment granting the same was awarded by the Oklahoma County District Court after consideration of the detailed supporting time statements presented by C&L's counsel. (App. 18).

Potawatomi appealed and C&L again raised both the argument that sovereign immunity never attached and that, assuming for argument that sovereign immunity attached, it was expressly waived by the Potawatomi's agreement to arbitration and consent to enforcement of any arbitration award in the Oklahoma state courts. Without reaching the question of whether the execution of the arbitration agreement constituted a waiver of sovereign immunity, the Oklahoma Court of Appeals affirmed the District Court judgments based on the ruling in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996).

Potawatomi petitioned this Court for certiorari to the Court of Civil Appeals of Oklahoma (Case No. 96-1721). This Court granted the petition on June 1, 1998 and ordered that the original opinion of the Court of Civil Appeals of Oklahoma be vacated and remanded for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998).

On remand, the Court of Civil Appeals for the State of Oklahoma, Division 2, addressed the waiver of sovereign immunity issue but nevertheless reversed the judgments of the District Court of Oklahoma County, Oklahoma on February 8, 2000 and denied the C&L's petition for rehearing on March 27, 2000. C&L's petition for writ of certiorari seeking discretionary review by the Oklahoma Supreme Court was denied May 24, 2000. Mandate has issued but its effectiveness had been suspended pending the resolution of this petition. (App. 11).

REASONS FOR GRANTING THE WRIT

Proposition 1: The Oklahoma Appellate Court Has Decided an Important Federal Question in a Way That Conflicts with Decisions of the Seventh Circuit Court of Appeals, the Eighth Circuit Court of Appeals and Decisions of the State Courts of Last Resort for Alaska and Arizona.

As a matter of federal law, an Indian tribe is subject to suit where it has waived sovereign immunity.[3] Even assuming that the Potawatomi's contract with C&L could otherwise be frustrated by sovereign immunity, any sovereign immunity from suit to enforce the arbitration award was expressly waived by Potawatomi. Therefore, jurisdiction was properly exercised by the Oklahoma State Court pursuant to the provisions of the Oklahoma Uniform Arbitration Act, 15 Okla. Stat. tit. §§ 801-818.

[3] *Id.* at 754, 118 S.Ct. at 1702.

The Oklahoma Court of Civil Appeals declined to enforce the arbitration agreement contrary to the opinions of other state and federal courts consistently finding such agreements waive sovereign immunity.

The contract at issue, an American Institute of Architects form agreement, was prepared and proposed by Potawatomi and the contract terms and provisions not set forth in the form were drafted by Potawatomi and its architect. The contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . The award rendered by the arbitrator or arbitrators shall be final, and **judgment may be entered upon it** in accordance with applicable law in **any court** having jurisdiction thereof . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein **shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**

(App. 46, Article 10.8) (emphasis added).

Among the courts which have specifically considered arbitration agreements such as the agreement between Petitioner and C&L, in the context of claims of sovereign immunity, the outcomes have been consistent and contrary to the ruling of the Oklahoma Court of Civil Appeals. In *Native Village of Eyak v. GC Contractors,* 658 P.2d 756 (Alaska 1983), the agreement between the parties

contained an arbitration clause with terms virtually identical to the clause at issue herein providing that the agreement:

> . . . shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

Id. at 758.

Interpreting the effect the arbitration clause the Alaska Supreme Court stated:

> . . . we believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

In ruling that the arbitration agreement constituted a waiver of suit immunity, the Alaska Court considered *United States v. Oregon,* 657 F.2d 1009 (9th Cir. 1981). There, the court held that an Indian tribe's agreement, to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1016.

In *Val/Del, Inc. v. Superior Court,* 703 P.2d 502 (Ariz.App. 1985), *cert. denied,* 474 U.S. 920, 106 S.Ct. 250

(1985), the Pascua Yaqui Tribe entered into an agreement with Val/Del, Inc., to manage the tribe's bingo operation. The court first determined that the Tribe was generally entitled to sovereign immunity. Likewise, the court acknowledged that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Id.* at 508.

On this foundation, the court considered an arbitration clause contained in the contract between the parties. Again, the substantive provisions of the clause considered are virtually identical to the provisions of the clause at issue herein. The agreement provided:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the arbitration rules of the American Arbitration Association, and judgment upon the action rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Id.

The *Val/Del* court cited with approval both *Native Village of Eyak v. GC Contractors* and *United States v. Oregon* discussed above. The court further stated that:

> Before entering into the arbitration agreement, the respondent tribe was free from suit by Plaintiff. However, **after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity . . . Having expressly waived its sovereign immunity, civil**

> **jurisdiction would properly lie with the State of Arizona . . .**

Val/Del, at 509. (emphasis added).

In both *Val/Del* and *Native Village of Eyak v. GC Contractors*, state supreme courts have considered arbitration clauses in contracts with Indian tribes otherwise possessing sovereign immunity. The clauses in these cases were virtually identical to the arbitration agreement herein and were clearly no more explicit or unequivocal in waiving sovereign immunity. In both cases, the courts specifically found the arbitration agreements to be the "clear" "unequivocal" and "express" waiver of immunity which the Potawatomi argue is required.

The Supreme Court of Alaska subsequently reviewed the ruling of *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989) (cited below by Potawatomi) as well as its prior ruling in *Eyak*, in the case of *Hydaburg CO-OP v. Hydaburg Fisheries*, 826 P.2d 751 (Alaska 1992). The court assumed arguendo that the Appellant CO-OP was entitled to tribal sovereign immunity based upon its historical tribal status. The court went on to state that the CO-OP waived sovereign immunity from suit by entering into an arbitration agreement. *Id.* at 754.

Then, addressing *Pan American* the court distinguished it from *Eyak* as follows:

> Unlike *Native Village of Eyak, Pan American* did not involve a suit to compel arbitration or enforce an arbitration award. Instead, by challenging the validity of a tribal ordinance, *Pan*

> *American* directly attacked the tribe's authority to regulate affairs on its reservation.

Id.

The *Hydaburg* court discussed for comparison situations involving foreign sovereigns. The court cited the Restatement of the Foreign Relations Law of the United States:

> [A]n agreement to arbitrate is a waiver of immunity from jurisdiction in
>
> (i) an action or other proceeding to compel arbitration pursuant to the agreement; and
>
> (ii) an action to enforce an arbitral award rendered pursuant to the agreement; . . .

1 Restatement (Third) of the Foreign Relations Law of the United States § 456(2)(b) (1987) (quoted in *Hydaburg*, at 754).

The court then proceeded to set forth a number of authorities applying this principal to arbitration agreements with foreign sovereigns. Acknowledging that federal courts have explicitly held that Indian tribes are not foreign states, the *Hydaburg* court stated that:

> Nevertheless, the rationale of the cases relating to waiver of immunity by foreign sovereigns is equally applicable to waiver of sovereign immunity by Indian tribes.

Id.

The Potawatomi argue that a specific waiver must somehow recite the magic words of "waiver," "Indian" and "immunity" and that absent such an incantation, waiver can only be inferred. No authority whatsoever is

cited for this proposition by the Potawatomi and, indeed, none of the authorities cited by either party supports such a restrictive and mechanical view. As defined by *Black's Law Dictionary*, 1417 (rev. 5th ed. 1979), "Express Waiver" is simply "[t]he voluntary, intentional relinquishment of a known right."

Clearly, the arbitration agreement proposed by Potawatomi and agreed to by both parties constitutes a voluntary, intentional relinquishment of any sovereign immunity from suit to enforce the arbitration agreement or arbitration award.

Despite Potawatomi's strained effort below to characterize the present arbitration clause as a waiver of suit immunity "by inference" only, the clause could not be more explicit. Indeed, no inference is required from the provisions of the clause that "**judgment may be entered upon**" the arbitration award and that the arbitration agreement "**shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**" The arbitration clause is clearly an express waiver of immunity by the Potawatomi as was correctly determined by the Oklahoma County District Court.

More recent cases directly on point have echoed the analysis and findings of the authorities discussed above. Indeed, recent authorities are even clearer that language essentially identical to or even less explicit than the arbitration agreement at issue herein does constitute an explicit waiver of sovereign immunity from suit.

In *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995), the Eighth Circuit Court of Appeals found a clear waiver of

sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association.

Unlike the agreement in the case at bar, the *Rosebud* agreement did not even contain the specific language stating that judgment may be entered upon any award rendered. Rather, the court looked to Rule 47(c) of the AAA Construction Industry Rules (also applicable to the case at bar) which provides:

> Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

Id. at 562.

Responding to protests of the tribe that the agreement only implied a waiver, the Eighth Circuit Court of Appeals stated there was no authority requiring the "invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." The court found an explicit waiver of sovereign immunity. *Id.* at 563.

On remand, the district court granted summary judgment to the contractor and entered judgment in the amount of the arbitration award. The tribe appealed and the issue was again addressed in *Val-U Construction v. Rosebud Sioux Tribe*, 146 F.3d 573 (8th Cir. 1998). There, the Eighth Circuit Court of Appeals reaffirmed its previous finding that the arbitration clause was an explicit waiver of sovereign immunity from suit.

The Court went on to explain how its decision in *Rosebud Sioux Tribe* was not inconsistent with its previous ruling in *American Indian Agricultural Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, at 1380 (8th Cir. 1985) stating the distinction that in *Standing Rock* the promissory note did not specifically designate an arbitral forum to settle all disputes and did not include a consent to judicial enforcement of the arbitration award. *Val-U Construction* at 577.

Waiver of sovereign immunity from suit by consent to arbitration was also found in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). There, an Indian tribe sued to invalidate an architectural services contract for lack of approval by the Bureau of Indian Affairs and the architect proceeded to arbitration upon the contract for recovery of its services rendered.

The arbitration went forward without the tribe's participation, resulting in an award in favor of the architect. An action to confirm the arbitration award was stayed while the court considered whether sovereign immunity had been waived. Again, the arbitration agreement at issue therein contained language that was virtually identical to the arbitration provision of the agreement between Potawatomi and C&L, providing:

> 'Claims, disputes or other matters' arising out of or related to the contract 'shall be subject to and decided by arbitration in accordance with the [rules] . . . of the American Arbitration Association' . . . that the agreement to arbitrate 'shall be specifically enforceable in accordance with applicable law in any court having jurisdiction'

> and that 'judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof.'

Id. at 659.

Considering whether the arbitration agreement was a clear waiver of sovereign immunity. The court stated:

> **There is nothing ambiguous about this language**. The tribe agrees to submit disputes arising under the contract to arbitration, to be bound by the arbitration award, and to have its submission and the award enforced in a court of law. **To agree to be sued is to waive any immunity one might have from being sued.**

Id. (emphasis added).

Continuing, the Seventh Circuit Court of Appeals stated:

> The arbitration clause could not be much clearer . . . No one reading this clause could doubt that the effect was to make the tribe suable. The waiver is at least as perspicuous as the statement – perhaps the only statement – that would satisfy the tribe's current lawyer as constituting an explicit waiver of sovereign immunity: 'The tribe will not assert the defense of sovereign immunity if sued for breach of contract.' The term 'sovereign immunity' is a technical legal term, and anyone who knows what it means can also understand the arbitration clause.

Id. at 660.

Finally, the Seventh Circuit Court of Appeals directly addressed and rejected the arguments raised herein by Potawatomi and apparently followed by the Oklahoma Court of Civil Appeals. The *Sokaogon* court stated:

> **The waiver in this case is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that**. The examples are not limited to Indian law. When states or the federal government waive sovereign immunity, as in the Federal Tort Claims Act or the Tucker Act, they do not say they are waiving 'sovereign immunity'; they create a right to sue, just as in the arbitration clause here.

Id. (emphasis added).

The Court in *Sokaogon*, citing *Prima Paint Corporation v. Flood & Conklin Mfg.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), further stated:

> Although the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause.

Sokaogon at 659.

In its Opinion, the Oklahoma Court of Civil Appeals agreed that C&L "makes a persuasive argument that the language providing for arbitration, and the enforcement of arbitrator's award, clearly indicate Tribe's agreement to suit in Oklahoma courts." The Court of Appeals went on to state that *Native Village of Eyak, supra*, cited in the proceedings below by C&L, was directly on point. *See* App. 5.

Finally, Oklahoma Court of Civil Appeals stated that the logic of *Native Village of Eyak* was "unassailable" but expressed concern that the court therein nevertheless relied on an implied waiver. Despite finding that the

arbitration agreement and contract language "indicate a willingness on Tribe's part to expose itself to suit on the contract," the court said that the "leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression." *See* App. 7.

The Opinion of the Oklahoma Court of Civil Appeals squarely conflicts with the unanimous opinions of courts having addressed this issue in the context of arbitration agreements with Indian tribes. Opinions directly on point from the Seventh Circuit Court of Appeals, Eighth Circuit Court of Appeals, the Alaska Supreme Court and the Arizona Supreme Court have consistently found an explicit waiver of sovereign immunity from language essentially identical to or even less explicit than the arbitration agreement at issue herein.

If the agreement here that "all claims or disputes . . . shall be decided by arbitration . . . and **judgment may be entered upon** [the award]," is not a clear and explicit waiver of immunity from suit to enforce an arbitration award, then the language is rendered meaningless. The question then must be: what specific language is required? If the specific words "we waive sovereign immunity" are required, then virtually every court other than the Oklahoma Court of Civil Appeals is not following such a rule.

Given the obvious magnitude of contracts bearing language essentially identical to the arbitration provisions at issue herein, this Court must speak to the matter and resolve the conflict between Oklahoma and every

other jurisdiction which has addressed waiver of sovereign immunity by this contract language.

CONCLUSION

This Court should grant the petition for writ of *certiorari*, reverse the judgment of the Oklahoma Court of Civil Appeals, Division 2, and remand with instructions consistent with prevailing opinions of other state and federal courts as set forth above.

Respectfully submitted,

JOHN D. MASHBURN
Counsel of Record
JAMES W. CARLTON JR.
GARVIN, AGEE, CARLTON & MASHBURN, L.L.P.
2100 City Place
204 North Robinson
Oklahoma City, OK 73102
(405) 232-9996 FAX (405) 232-4061

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed Wednesday, May 24, 2000)

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

86,568 C & L Enterprises, Inc; v. Citizen Bank Pottawatomi Tribe of Oklahoma,
Petition for certiorari is denied.
CONCUR: Summers, C.J., Kauger, Boudreau, JJ.
CONCUR BY REASON OF STARE DECISIS: Watt, Winchester, JJ.
DISSENT: Hargrave, V.C.J., Hodges, Lavender, Opala, JJ.

/s/ Hardy Summers
CHIEF JUSTICE

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

C&L ENTERPRISES, INC., Appellee, vs. THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Appellant.	)	No. 86,568 NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

(Filed Feb. 8, 2000)

Honorable Leamon Freeman, Trial Judge

John Mashburn
Garvin, Agee, Carlton &
Mashburn
Oklahoma City, Oklahoma — For Appellee

Michael Minnis
David McCullough
Michael Minnis & Associates, P.C.
Oklahoma City, Oklahoma — For Appellant

OPINION

STUBBLEFIELD, J.

This is an appeal by a federally recognized Native American tribe – The Citizen Band Potawatomi Indian Tribe of Oklahoma – from judgment of the district court confirming an arbitration award entered in a contract

dispute. The original opinion of this court, affirming the judgment of the trial court, was appealed by writ of certiorari to the United States Supreme Court. That Court vacated our judgment and remanded the case with instructions for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). The case has been returned to us on January 7, 2000, for review pursuant to that reversal and remand. Based on our review of the record on appeal, and the cited case, we reverse the trial court judgment and remand with instructions to dismiss.

This lawsuit arose from a contract entered in August 1993, between the Citizen Band Potawatomi Indian Tribe (Tribe) and C&L Enterprises, Inc. (C&L). C&L was to construct a roof on a building being built by Tribe. The record indicates that the construction was a commercial endeavor by Tribe – Tribe had purchased land from First Oklahoma Bank and was constructing on the property what the contract designated: "The Building for the First Oklahoma Bank."

After execution of the contract with C&L, Tribe apparently decided to change the nature of the roof on the building from that described in the C&L contract. It gave the contract for the new roof to another company. C&L claimed breach of contract and, pursuant to terms of the contract, took the matter to arbitration. The arbitrator awarded C&L approximately twenty-nine percent of the contract price as damages and also awarded attorney fees. C&L filed this action to confirm the award.

Tribe defended this action by moving to dismiss because of its immunity from suit. However, the lower

court denied Tribe's motion to dismiss and thereafter Tribe generally declined to appear in the lawsuit. The lower court entered judgment confirming the arbitration award and judgment for attorney fees. Tribe appealed, largely maintaining that the trial court erred in its refusal to find it immune from suit.

This court first decided the appeal by following the authority of the Oklahoma Supreme Court as stated in *Hoover v. Kiowa Tribe of Oklahoma*, 1995 OK 136, 909 P.2d 59, which held that a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country. *Id.* at ¶9, 909 P.2d at 62. However, the United States Supreme Court considered the identical issue in an appeal from a judgment of another division of this court, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, 523 U.S. 751 (1998), and decided directly to the contrary – that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at ___, 118 S. Ct. 1700, 1702. The Oklahoma Supreme Court, in a case involving a similar reversal with instructions to consider the case in light of *Manufacturing Technologies*, reversed its prior judgment and ordered the state district court to enter judgment for the tribe. *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 1998 OK 126, 975 P.2d 450. In *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, 1998 OK 128, ¶11, 975 P.2d 442, 445, the Oklahoma Supreme Court expressly overruled its holding in *Hoover*.

We have reviewed our earlier decision in light of the United States Supreme Court decision in *Manufacturing Technologies*. We conclude that the trial court was not

vested with jurisdiction over the dispute by virtue of the fact that the contract that formed the basis of the controversy was executed and to be performed outside of Indian Country. However, because the Court in *Manufacturing Technologies* recognized that a tribe may waive its sovereign immunity, this court must determine if such a waiver occurred in this instance.

C&L argues that language in the parties' contract – which C&L claims was prepared by Tribe and its attorneys – constitutes Tribe's clear and unequivocal waiver of its immunity from suit. C&L references the contractual agreement to arbitrate as well as the specific language:

> The award entered by the arbitrator . . . shall be final, and the judgment may be entered upon it in accordance with applicable law *in any court having jurisdiction thereof*, . . . The agreement herein among the parties . . . to arbitrate . . . shall be specifically enforceable under applicable law *in any court having jurisdiction thereof.* (Emphasis added.)

C&L makes a persuasive argument that the language providing for arbitration, and the enforcement of arbitrator's award, clearly indicate Tribe's agreement to suit in Oklahoma courts. Further, C&L cites Alaska authority directly on point. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), the Alaska Supreme Court held that an arbitration agreement, along with related mention of court enforcement, constituted a tribe's waiver of immunity. The court stated:

> [W]e believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the

> parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

The logic of the *Native Village* court is unassailable, but we are concerned that the court analyzed the contract, which admittedly did not contain an express waiver, and relied on an implied waiver – language constituting a "sufficiently clear and unequivocal waiver of immunity to be effective." *Id.* at 758. It has long been the rule that tribal sovereign immunity can be surrendered only by express waiver. *Price v. United States*, 174 U.S. 373, 375-76 (1899). The United States Supreme Court more recently stated in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), that tribal sovereign immunity may not be waived by implication but must be "unequivocally expressed." *Id.* at 58.

Citing the case of *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), C&L asserts that the language in the contract constitutes a sufficient expression of waiver on Tribe's part. The court in that case held that by the tribe's intervention into a lawsuit and its prior agreement to submit disputes over fishing to the Oregon federal district court, the tribe "expressly consented to [the] suit," and waived sovereign immunity. *Id.* at 1016.

However, other courts have been more reluctant to broaden the scope of what constitutes an express waiver. In fact, in *American Indian Agric. Credit Consortium Inc. v.*

Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985), the court referred to *United States v. Oregon* as "suggest[ing] substantially broader criteria for a finding of express waiver, and surely presses the outer boundary of what the Supreme Court intended by its plain statement in *Santa Clara Pueblo*," 780 F.2d at 1380.

In this instance, the contract does not expressly waive Tribe's sovereign immunity. The agreement of Tribe to arbitration, and the contract language regarding enforcement in courts having jurisdiction, seem to indicate a willingness on Tribe's part to expose itself to suit on the contract. However, the leap from that willingness to a waiver of immunity is one based on implication, not an unequivocal expression.[1]

We conclude that the record does not support a finding of express waiver of immunity on the part of The Citizen Band Potawatomi Indian Tribe of Oklahoma. Therefore, we reverse the judgment of the district court, including the order granting prevailing party attorney fees under 12 O.S. 1991 § 936, and remand with instructions to sustain the motion to dismiss of Tribe.

REVERSED AND REMANDED WITH INSTRUCTIONS.

GOODMAN, C.J., and REIF, J., concur.

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[1] Although the record does not give us any information regarding Tribe's legal system, another reasonable implication of the language of the contract might be that Tribe's own courts are the "court[s] having jurisdiction thereof" mentioned in the contract.

Supreme Court of the United States

***No.* 96-1721**

CITIZEN POTAWATOMI NATION,

Petitioner

v.

C&L ENTERPRISES, INC.

ON WRIT OF CERTIORARI to the Court of Civil Appeals of Oklahoma, Second Division.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Court of Civil Appeals of Oklahoma, Second Division, for further consideration in light of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U. S. ___ (1998).

IT IS FURTHER ORDERED that the petitioner Citizen Potawatomi Nation recover from C&L Enterprises, Inc., Three Hundred Dollars ($300.00) for costs herein expended.

June 1, 1998

Clerk's Costs: $300.00

Supreme Court of the United States

***No.* 96-1721**

CITIZEN POTAWATOMI NATION,

Petitioner

v.

C&L ENTERPRISES, INC.

ORDER ALLOWING CERTIORARI. Filed June 1, 1998.

The petition herein for writ of certiorari to the Court of Civil Appeals of Oklahoma is granted.

IN THE COURT OF CIVIL APPEALS

STATE OF OKLAHOMA

DIVISION 2

(Filed Mar. 27, 2000)

THE CLERK IS DIRECTED TO NOTIFY ALL PARTIES OF THE FOLLOWING ORDER (S):

86,568 C&L ENTERPRISES, INC., Appellee, vs. THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Appellant.

Appellee's Motion for Leave to File Supplemental Authorities or Supplemental Brief is DENIED because this court's opinion was filed on February 8, 2000.

Petition for Rehearing of Appellee is DENIED.

The Supersedeas Bond is ordered exonerated and the Clerk of the Appellate Courts is directed to tax all allowable costs against Appellee.

DONE in conference this 24th day of March, 2000.

/s/ Ronald J. Stubblefield
RONALD J. STUBBLEFIELD
Presiding Judge
Division 2

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

(Filed June 9, 2000)

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

86,568 C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma.
Mandate shall issue but it's effectiveness shall be suspended pending the filing of petition for certiorari in U.S.S.C or expiration of time to file.

/s/ Hardy Summers
CHIEF JUSTICE

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

C&L ENTERPRISES, INC., an Oklahoma corporation, Appellee,	)	
vs.	)	No. 86,568
THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Appellant.	)	NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Honorable Leamon Freeman, Trial Judge

John Mashburn
James Carlton, Jr.
Garvin, Agee, Carlton & Mashburn
Oklahoma City, Oklahoma For Appellee

Michael Minnis
David McCullough
Michael Minnis & Associates, P.C.
Oklahoma City, Oklahoma For Appellant

MEMORANDUM OPINION

(Filed Nov. 5, 1996)

STUBBLEFIELD, J.

This is an appeal by a federally recognized Native American tribe – The Citizen Band Potawatomi Indian Tribe of Oklahoma – from judgment of the district court confirming an arbitration award in a roofing contract dispute regarding non-trust, off-reservation property. Based on our review of the record on appeal and applicable law, we affirm.

In August 1993, the Citizen Band Potawatomi Indian Tribe (Tribe) entered into a contract with C&L Enterprises, Inc., (C&L) for C&L to construct a roof on a building being built by the Tribe. The record indicates that the construction was a commercial endeavor by the Tribe – the Tribe had purchased the land from First Oklahoma Bank some four months earlier and was constructing on the property what the contract designated "The Building for The First Oklahoma Bank."

After execution of the contract with C&L, the Tribe apparently decided to change the nature of the roof on the building from that described in the C&L contract. They gave the contract for the new roof to another company. C&L claimed breach of contract and, pursuant to terms of their contract, took the matter to arbitration. The arbitrator awarded C&L approximately twenty-nine percent of the contract price as damages and also awarded attorney fees. C&L filed this action to confirm the award.

The Tribe defended this action by moving to dismiss because of its immunity from suit. However, the lower

court denied the Tribe's motion to dismiss and, thereafter, the Tribe generally declined to appear in the lawsuit. The lower court entered judgment confirming the arbitration award and judgment for attorney fees. The Tribe appeals largely maintaining that the trial court erred in its refusal to find it immune from suit.

Dispositive of this issue is the case of *Hoover v. Kiowa Tribe of Oklahoma,* 909 P.2d 59 (Okla. 1995). The *Hoover* court dealt with the identical issue – whether "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." *Id.* at 60; *see also First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee,* 913 P.2d 299 (Okla. 1996). The *Hoover* court answered the question in the affirmative.

The *Hoover* court cited favorably the New Mexico case of *Padilla v. Pueblo of Acoma,* 754 P.2d 845 (N.M. 1988), *cert. denied* 490 U.S. 1028 (1989), which also dealt with a dispute between a non-Indian roofing contractor and an Indian Tribe over roofing contract work performed on two building projects located off the reservation. The New Mexico court in *Padilla* found that the tribe was not immune from suit.

The *Hoover* court held that a "contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." 909 P.2d at 62. It is not disputed that, in this instance, the construction project was on newly purchased land that was neither trust nor reservation land. Thus, we conclude that *Hoover* directly controls on the issue of tribal immunity.

The Tribe also claims the lower court erred in not *sua sponte* reviewing "patent legal issues and/or examining the damage evidence." However, the Tribe admits that it raised none of these "substantive issues" in the lower court. Parties are simply not permitted to raise issues on appeal that were not raised in the trial court. *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230, 1236 (Okla. 1989). "[I]t is well settled that a litigant may not remain silent and speculate on the outcome of the trial, and then complain on appeal." *Missouri-Kansas-Texas R.R. Co. v. Callison*, 383 P.2d 696, 699 (Okla. 1963).

The Tribe also complains of the award of attorney fees, based largely on the basis of immunity – an issue we have already resolved against it. It also complains that the award was supported by "insufficient and incomplete" evidence. Once again, this was not an issue raised in the lower court. However, we note that the lower court was presented with contemporaneous time records, which support the lower court's judgment. *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979). Furthermore, the record indicates that purportedly unrelated legal matters were all directed at maintaining the lawsuit in the District Court of Oklahoma County and in defending that court's jurisdiction over the dispute.

The judgment of the lower court is AFFIRMED in all regards.

GOODMAN, P.J., and BOUDREAU, J., concur.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

C & L ENTERPRISES, INC., an Oklahoma corporation, Appellee, v. CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, Appellant.	)	No. 86,568

ORDER AND JUDGMENT ON SUPERSEDEAS BOND

(Filed Jan. 27, 1997)

Certiorari is denied. Appellee's motion for an appeal-related counsel fee is granted. 12 O.S. 1991 § 936; *Sisney v. Smalley,* Okl., 690 P.2d 1048, 1051 (1984). Following the issuance of mandate the trial court is authorized to determine the amount of the appeal-related counsel fee to be awarded to the appellee in an adversarial hearing after proper notice.

Appellee's motion for judgment on supersedeas bond is granted. Judgment is hereby rendered on the supersedeas bond against Citizen Potawatomi Nation as principal, and Mid-Continent Casualty Company, as surety, in the amount of $28,499.63 plus $11,077.39, with interest thereon at the statutory rate from October 27, 1995 and from March 21, 1996, respectively, until paid, not to

exceed the penal sum of the supersedeas bond. The district court is directed to enforce this judgment as if rendered in that court.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 27th DAY OF JANUARY, 1997.

/s/ Ralph B. Hodges
ACTING CHIEF JUSTICE

HODGES, LAVENDER, SIMMS, HARGRAVE, WILSON and WATT, JJ., concur.

OPALA, J., concur in denying certiorari; concur in part and dissent in part from the counsel-fee award judgment on supersedeas bond. The award is flawed because it does not include a certiorari-related fee. The judgment should be only against the surety.

KAUGER, C.J., SUMMERS, V.C.J., Dissent.

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

ORDER TAXING ATTORNEY FEES AND COSTS

(Filed March 21, 1996)

ON THIS DAY, there comes on for hearing Amended Application of Plaintiff for an order taxing attorney fees and costs, Plaintiff appearing by counsel of record and Defendant appearing not.

The Court having previously granted judgment for said Plaintiff wherein the Court ordered that Plaintiff shall recover its costs herein and a reasonable attorney's fee, pursuant to 12 O.S. § 936, and the court having further considered the statements of counsel, the applications filed herein, the time records of counsel for said Plaintiff, and the expenses incurred herein, the Court finds that the costs and attorney fees set forth below are reasonable and should be assessed against Defendant and taxed as part of the judgment herein.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED that Plaintiff, C & L ENTERPRISES

INC., shall have and recover of and from Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $10,545.00 which the Court determines to be a reasonable attorney's fee, additional accrued costs in the sum of $532.39 and all accruing costs, to be taxed with the Judgment previously entered herein.

DATED THIS 21 DAY OF March, 1996.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN, OBA #12763
Attorneys for Plaintiffs
2100 City Place
204 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 21 day of March, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

JOURNAL ENTRY OF JUDGMENT CONFIRMING ARBITRATION AWARD

(Filed Oct. 27, 1995)

ON THIS DAY, there comes on for hearing Petition of Plaintiff by Plaintiff's Motion for Confirmation of Arbitration Award, Plaintiff appearing by its attorney and Defendant appearing ~~by its attorney~~ not,

And the Court having reviewed Plaintiff's Petition filed pursuant to 15 O.S. § 815, the arbitration agreement at issue and the arbitration award entered between the parties on June 30, 1995, and Defendant not having urged vacation, modification or correction of said award within the time prescribed by 15 O.S. §§ 811-813,

The Court finds that said arbitration agreement, arbitration proceedings and arbitration award are consistent with and subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801-818 and that the Award of Arbitrator as attached to Plaintiff's Petition was

duly entered, is binding upon the parties and, for good cause shown, should be confirmed.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED by the Court that Plaintiff have and recover of and from Defendant, Judgment confirming the Award of Arbitrator attached to Plaintiff's Petition as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment at 8.31% per annum until paid, a reasonable attorneys' fee to be determined upon application of Plaintiff, accrued costs in the sum of $84.96, and all accruing costs.

DATED THIS 27 DAY OF OCTOBER, 1995.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN – OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 27 day of October, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Oct. 13, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
204 N. Robinson
Okc, OK 73102
232-9996

-vs-

Case No. CJ-95-5204

Citizen Band Potawatomi Tribe of Oklahoma
a/k/a Citizen Band Potawatomi Indians of Oklahoma

Defendant(s)

/s/ Michael Minnis David McCullough
Attorney(s) for Defendant(s)
3160 Liberty Tower
100 N. Broadway,
Okc, OK 73102

COURT ORDER

Date: October 13, 1995 Judge Leamon Freeman
Hearing On: Motion to Reconsider
Ruling By Court: Denied

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Sep. 22, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
Okc, OK 73102
232-9996

-vs-

Case No. CJ-95-5204-64

Citizen Band Potawatomi Tribe
Defendant(s)

/s/ Michael Minnis
Attorney(s) for Defendant(s)
3160 Liberty Tower
Okc, [sic] 73102
235-7686

COURT ORDER

Date: 9/22/95 Judge _____
Hearing On: Motion to Dismiss
Ruling By Court: Overruled, Defendant granted 20 days to answer.

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES, INC.,

Plaintiff,

v. Case No. CJ-95-5204-64

CITIZEN BAND POTAWATOMI TRIBE
OF OKLAHOMA a/k/a CITIZEN BAND
POTAWATOMI INDIANS OF OKLAHOMA.

MOTION TO DISMISS
(Filed Aug. 25, 1995)

COMES NOW the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi"), appearing specially, and moves the court to enter an order dismissing the "Petition for Confirmation of Arbitration Award" (August 7, 1995) filed herein on the basis that this court lacks jurisdiction over the person of the "Potawatomi", that the Potawatomi lack the capacity to be sued, or, alternatively, that the service of process was insufficient. 12 O.S. 1991, § 2012, ¶¶ B.2, B.9 and B.5. Consistent with District Court Rule 4, this motion is accompanied by a concise brief.

MICHAEL MINNIS & ASSOCIATES, P.C.

By /s/ Michael Minnis
Michael Minnis, OBA #6251
David McCullough,
OBA #10898
3160 Liberty Tower
100 North Broadway
Oklahoma City, OK 73102
(405) 235-7686
ATTORNEYS FOR CITIZENS BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 1995, a true and correct copy of the above and foregoing was mailed, postage prepaid, to:

John Mashburn
2100 City Place
204 North Robinson
Oklahoma City, OK 73102

ATTORNEY FOR PLAINTIFF

/s/ Michael Minnis
Michael Minnis
David McCullough

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	CASE NO. CJ-95-5204-64
v.	)	
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

PETITION
FOR CONFIRMATION OF ARBITRATION AWARD

(Filed Aug. 7, 1995)

COMES NOW Plaintiff and for its cause of action against the Defendant and pursuant to 15 O.S. § 815, respectfully states and alleges the following:

1. On August 25, 1993, the parties entered into a contract, executed within the State of Oklahoma, whereby Plaintiff was to surface the roof of a building for The First Oklahoma Bank, in Shawnee, Oklahoma. A true and correct copy of said contract is attached hereto as Exhibit "A" and incorporated herein.

2. Said contract was executed, for Defendant, by three officers of the Defendant including the Defendant's Chairman, John A. Barrett, Jr., its Secretary Treasurer, Bob Davis, and one other currently unidentified officer.

3. Said officers had actual and/or apparent authority to bind Defendant upon said contract.

4. The land which is the subject of the construction contract at issue herein, although currently owned by the Defendant, is neither Indian reservation nor "trust" land and was not validly set apart for the use of the Defendant as such under the superintendence of the Federal Government.

5. Plaintiff believes and therefore alleges that Defendant obtained or used funds for construction of the above-referenced bank which were non-tribe funds; *for example,* Economic Development Grant or other government grant funds.

6. In the event "Tribal Sovereignty" could have otherwise attached to the transactions between the parties, which Plaintiff denies, such sovereignty was waived by Defendant pursuant to the terms of the contract whereby the parties agreed to submit any claims or disputes to arbitration and further agreed that the award rendered by the arbitrator would be final, and judgment could be entered upon it in accordance with applicable law in any court having jurisdiction thereof, all as set forth at Article 10.8 in Exhibit "A."

7. Plaintiff complied with the terms of said contract and presented its demand for arbitration upon the breach of Defendant.

8. On June 30, 1995, after receiving the written statements and documents of the parties and having heard the evidence presented, the Arbitrator duly rendered an award for the Plaintiff as set forth in Exhibit "B" which is attached hereto and incorporated herein.

9. Said arbitration agreement, arbitration proceedings and arbitration award are consistent with and subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801 - 818.

10. Jurisdiction is proper with this Court by reason of execution of said contract within Oklahoma and by application of 15 O.S. § 802.B.

11. Venue is proper with this Court by virtue of Defendant's waiver of venue in Article 10.8 of Exhibit "A," and pursuant to the requirements of 15 O.S. § 816 as the arbitration hearing occurred in Oklahoma County, Oklahoma.

12. Defendant has wholly failed and refused to pay said Arbitration Award thereby necessitating the filing of this action for which Plaintiff is entitled to additional attorney's fees and costs.

WHEREFORE, Plaintiff prays that the Court enter Judgment confirming the Arbitration Award attached hereto as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment according to law, a reasonable attorneys' fee and all costs of this action.

GARVIN, AGEE, CARLTON
& MASHBURN

BY: /s/ John Mashburn
JOHN MASHBURN –
OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

PLAINTIFF'S
EXHIBIT
A

AIA Document A107

Abbreviated Form of Agreement
Between Owner and Contractor

For CONSTRUCTION PROJECTS OF LIMITED SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.

This document includes abbreviated General Conditions and should not be used with other general conditions. It has been approved and endorsed by The Associated General Contractors of America.

AGREEMENT

made as of the Twenty-Fifth day of August in the year of Nineteen Hundred and Ninety-Three

BETWEEN the Owner: Citizen Band Potawatomi
(Name and address) Tribe of Oklahoma
1901 South Gordon Cooper Drive
Shawnee, Oklahoma 74801

and the Contractor: C & L Enterprises Inc.
(Name and address) P.O. Box 406
Lindsay, Oklahoma 73052

The Project is:
(Name and location)

The Building for
The First Oklahoma Bank
Shawnee, Oklahoma
Project Number 9202

The Architect is:
(Name and address)

Price Group Architects
and Planners
14 East 9th
Shawnee, Oklahoma 74801
273-2200

The Owner and Contractor agreed as set forth below.

Don Dunning
Mobil – 620-1590

660-5700-
PAGER

Call Don on Ap 25 11:30

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ARTICLE 1

THE WORK OF THIS CONTRACT

1.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent

specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

Furnish roofing consisting of Perlite Board Foam Insulation, 1 Inch, 52 Mils Neogard 70613 Series Coating, Five Year Warranty, One Year Defect Bond, Eleven (11) RoofDrains, Cap Flashing.

See Attachment #1

ARTICLE 2

DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1 The date of commencement is the date from which the Contract Time of Paragraph 2.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or if applicable, state that the date will be fixed in a notice to proceed.)

Date will be fixed per notice to proceed.

2.2 The Contract shall achieve Substantial Completion of the entire Work not later than

(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)

Per construction managers schedules.

subject to adjustment of the Contract Time as provided in the Contract Documents.

(Insert provisions, if any for liquidated damages relating to failure to complete on time.)

ARTICLE 3

CONTRACT SUM

3.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of Eighty-Five Thousand Dollars ($85,000.00), subject to additions and deductions as provided in the Contract Documents.

3.2 The Contract Sum is based upon the following alternates. If any, which are described in the Contract Documents and are hereby accepted by the Owner:

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)

Not applicable

3.3 Unit prices, if any, are as follows:

None

ARTICLE 4

PROGRESS PAYMENTS

4.1 Based upon Applications for Payments submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

> Applications for payment to be submitted on or before the 25th day of each month. Payment of said application due on or before the 5th day of the following month.

4.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business. The location of the project and elsewhere may affect the validity of this provision. Legal advice should be obstained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

ARTICLE 5

FINAL PAYMENT

5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

ARTICLE 6

ENUMERATION OF CONTRACT DOCUMENTS

6.1 The Contract Documents are listed in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

6.1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A107, 1987 Edition.

6.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated ___, and are as follows:

Document ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.3. The Specifications are those contained in the Project Manual dated as in Subparagraph 6.1.2., and are as follows:

(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.4 The Drawings are as follows, and are dated ___ unless a different date is shown below:

(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

Number ___ Title ___ Date ___

Per Plans and Specifications.

6.1.5 The Addenda, if any, are as follows.

Number ___ Date ___ Pages ___

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 6.

6.1.6 Other documents, if any, forming part of the Contract Documents are as follows:

(List any additional documents which are intended to form part of the Contract Documents.)

GENERAL CONDITIONS

ARTICLE 7

CONTRACT DOCUMENTS

7.1 The contract documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions). Drawings, Specifications, addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. The intent of

the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

7.2 The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

7.3 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

7.4 The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

ARTICLE 8

OWNER

8.1 The Owner shall furnish surveys and a legal description of the site.

8.2 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.

8.3 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

ARTICLE 9

CONTRACTOR

9.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution

and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

9.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

9.4 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

9.5 Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other

permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

9.6 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

9.7 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

9.8 The Contractor shall review, approve, and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals. When professional certification of performance criteria materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications.

9.9 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

9.10 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

9.11 The Contractor shall pay all royalties and license fees; shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents unless the Contractor has reason to believe that there is an infringement of patent.

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 9.12.

9.12.1 In claims against any person or entity indemnified under this Paragraph 9.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 9.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.12.2 The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specification, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 10

ADMINISTRATION OF THE CONTRACT

10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.

10.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally

familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.

10.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraphs 9.1 and 16.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

10.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for

results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance or final payment, shall be subject to arbitration upon the written demand of either party.

10.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

10.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings. Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

10.8 All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought

to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

ARTICLE 11

SUBCONTRACTS

11.1 A subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not

be required to contract with anyone to whom the Contractor has made reasonable objection. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

ARTICLE 12

CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such claim as provided elsewhere in the Contract Documents.

12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction

and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

12.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

ARTICLE 13

CHANGES IN THE WORK

13.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construct Change Directive signed by the Owner and Architect.

13.2 The Contract Sum and Contract Time shall be changed only by Change Order.

13.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

ARTICLE 14

TIME

14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

14.2 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 15.3.

14.3 If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

ARTICLE 15

PAYMENTS AND COMPLETION

15.1 Payments shall be made as provided in Articles 4 and 5 of this Agreement.

15.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to the Owner or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

15.3 When the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion.

15.4 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

15.5 The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

.1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the contract documents.

Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by the payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 16

PROTECTION OF PERSONS AND PROPERTY

16.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein; and

.3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

16.2 The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

ARTICLE 17
INSURANCE

17.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates of such insurance shall be filed with the Owner prior to the commencement of the Work.

17.2. The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining

this optional Owner's liability insurance unless specifically required by the Contract Documents.

17.3 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.

17.4. A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

17.5 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

17.6 The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 12, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 17 or any other property insurance applicable to the Work, except such rights as they may

have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 12, if any, and the subcontractors, sub-subcontractors agents and employees of any of them.

ARTICLE 18

CORRECTION OF WORK

18.1. The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

18.2 Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligation of the Contractor to correct

the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

ARTICLE 19

MISCELLANEOUS PROVISIONS

19.1 The Contract shall be governed by the law of the place where the Project is located.

19.2 As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

.1 not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion:

.2 not later than the date of issuance of the final Certificate for Payment for acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and

.3 not later than the date of the relevant act or failure to act by the Contractor for acts or failures to act occurring after the date of the final Certificate for Payment.

ARTICLE 20

TERMINATION OF THE CONTRACT

20.1 If the Architect fails to recommend payment for a period of 30 days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of 30 days, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

20.2 If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of the Contract, the Owner, after seven days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively, at the Owner's option, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses

made necessary thereby, such excess shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

ARTICLE 21

OTHER CONDITIONS OR PROVISIONS

Attachment Page 1.

This Agreement entered into as of the day and year first written above.

OWNER /s/ John A. Barrett, Jr. CONTRACTOR

/s/ Bob F. Davis Sec/Trea.
(Signature)

/s/ Lynn D. Scruggs
(Signature)

/s/ Hilton L. Melot
(Printed name and title)

C & L Enterprises Inc.
(Printed name and title)

[LOGO] Caution: You should sign an original AIA document which has this caution printed in red. An original assures that changes will not be obscured as may occur when documents are reproduced.

PROPOSAL

P.O. Box 406
Lindsay OK 73052
Lynn Scruggs 756-8415

No.
Date July 25, 93
Sheet No.

Proposal Submitted To:

Name Pottawatomi Tribe
Street 1901 S. Gordon
Cooper Drive
City Shawnee, OK 74801
State
Phone Mr. Don Dunning
275-3121

Work To Be Performed At:

RE: First Oklahoma Bank
Street
City State
Date of Plans
Architect
Fax 335-0198

We hereby propose to furnish the materials and perform the labor necessary for the completion of

Roof on Bank – Project #9202 – The Price Group

Roof Bid – Perlite Board, Foam Insulation, 1 inch
52 Mils Neosard - 70613 Series Coating
Five Year Warranty
One Year Defect Bond
11 Roof Drains
Cap Flashing

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of Eighty Five thousand dollars Dollars ($ 85,000).

with payments to be made as follows: _____

Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance upon above work. Workmen's compensation and Public Liability insurance on above work to be taken out by

Respectfully submitted
/s/ Lynn W. Scruggs
Per /s/ Lynn W. Scruggs

Note – This proposal may be withdrawn by us if not accepted within ___ days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date

Signature

Signature

PLAINTIFF'S
EXHIBIT
B

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY
ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Re: 71 E 110 00024 95
C & L Enterprises, Inc.
vs.
Citizen Band Potawatomi Tribe of Oklahoma
Oklahoma City, OK

ADMINISTRATOR: Tracey L. Hegeman

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the parties, and dated August 25, 1993, and having been duly sworn and having duly heard the proofs and allegations of C & L Enterprises, Inc. ("C & L"), and Citizen Band Potawatomi Tribe of Oklahoma ("Potawatomi") having failed to appear after due notice by mail in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Association"), hereby, AWARD, as follows:

Potawatomi shall pay to C & L the sum of Twenty Five Thousand Four Hundred Dollars and No Cents ($25,400.00).

Potawatomi shall pay to C & L the sum of Two Thousand Two Hundred Thirty Dollars and No Cents ($2,230.00) for attorney's fees.

Potawatomi shall pay to C & L the sum of Thirty Four Dollars and Sixty Seven Cents ($34.67) for attorney's costs.

The administrative fees of the American Arbitration Association totaling $763.00 shall be borne by Potawatomi. Therefore, Potawatomi shall pay to C & L the sum of $750.00 representing that portion of C & L's share of administrative fees previously paid to the Association. Potawatomi shall pay to the Association the sum of $13.00 representing that portion of Potawatomi's share of administrative expenses still due the Association.

The above sums are to be paid on or before thirty (30) days from the date of this Award.

This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are, hereby, denied.

DATE: June 30, 1995

SIGNED: /s/ Peter B. Bradford
Peter B. Bradford, Arbitrator